U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: SRC 03 112 52365 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to § 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of Florida that is doing business as a Steak-Out franchise. The petitioner claims that it is the subsidiary of the beneficiary's foreign employer, located in Mersin, Turkey. The petitioner now seeks to employ the beneficiary as its president for two years.

The director denied the petition concluding that the petitioner, which owns a Steak-Out franchise, does not possess a qualifying relationship with the beneficiary's foreign employer as required in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The director stated that according to Operating Instruction 214.2(l)(4) a business relationship based on a franchise agreement is not typically considered to be qualifying.

Counsel subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded it to the AAO for review. On appeal, counsel claims that Citizenship and Immigration Services (CIS) incorrectly denied the petition for an L-1A visa. Counsel acknowledges Operating Instruction 214.2(l)(4) and states that this does not apply to the organizations in the present matter because the petitioning organization is not a franchise. Counsel explains that the petitioning organization, a United States corporation, instead owns and is doing business as a franchise. Counsel contends that a parent-subsidiary relationship therefore exists between the beneficiary's foreign employer and the United States corporation. Counsel submits a brief in support of the appeal.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education,

training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The issue in the present matter is whether a qualifying relationship exists between the beneficiary's foreign employer and the United States entity as required in the Act at section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L).

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

(1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;

(2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and,

(3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

* * *

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

(J) *Branch* means an operating division or office of the same organization housed in a different location.

(K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(L) Affiliate means

(1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

The petitioner noted on the nonimmigrant petition that the petitioning organization is a subsidiary of the beneficiary's foreign employer because the foreign employer has a 51% ownership interest in the United States entity. In the attached documentation, the petitioner provided a letter from the beneficiary's foreign employer, dated February 11, 2003, in which the company's general manager stated that the foreign company owns 51% of the U.S. corporation. The petitioner provided an additional letter dated February 11, 2002 from the foreign company confirming its 51% ownership interest in the petitioning organization. In a third letter from the petitioner's accountant, the accountant stated that following a review of "the necessary documentation for both companies" he has determined that the foreign corporation owns 51% of the U.S. entity.

As additional evidence of a qualifying relationship, the petitioner submitted documentation, including a stock sale-purchase agreement, an assignment of subscription, a shareholders' resolution approving the sale of stock, and a stock certificate, confirming a March 2002 transfer of the petitioner's 1,000 shares of issued stock from a Francisco A. Garcia to the beneficiary and a second individual, Rizkalla Yaylagul. The stock certificate identified the beneficiary as the owner of 501 shares of stock in the petitioning organization.

The petitioner also provided its 2002 Form 1120S, U.S. Income Tax Return for an S Corporation, which indicated that the company had three shareholders at the end of the tax year. Three Schedules K-1, Shareholder's Share of Income, Credits, Deductions, etc., were attached, and identified the following interests in the petitioning corporation: JEESS, Inc., 51%; Rizkalla Yaylagul, 49%; Francisco Garcia, 0%.

In a request for evidence dated March 26, 2003, the director noted a discrepancy in the petitioner's claim that the foreign company owns 51% of the U.S. corporation stating that the stock certificate identifies an individual Erol Soysal as the owner of 501 shares. The director asked that the petitioner submit evidence that the foreign and United States companies satisfy the criteria of a parent-subsidiary relationship. The director also raised an additional issue of whether a qualifying relationship exists between the United States and foreign companies when the United States entity is a franchise.

In a response dated June 10, 2003, counsel provided the following explanation as to the discrepancy between the petitioner's claim of stock ownership and the stockholder identified on the corporate stock certificate:

> I apologize for the confusion. The stock in the US company was originally issued [redacted] in error. When the error was discovered [redacted] returned the stock that had been nominally issued to him personally to the corporation and his stock certificate was cancelled. A copy of the stock certificate issued to [redacted] showing that this certificate has been cancelled is attached as Exhibit 1. A new stock certificate for 51% of the US company was then issued to [redacted] Under the corporate charter the US company is authorized to issue 1,000 shares of stock. In order to simplify the stock holdings the US Company has issued a total of 510 shares to Soysaltrans Ltd and 490 shares issued to [redacted] Copies of the stock certificates issued by the US Company, totaling 1,000 shares, are attached, together with a copy of the Corporate Stock Transfer Record as Exhibit 2.

Counsel also acknowledged the director's claim that a business relationship based on a franchise agreement is not typically considered qualifying, but explained that in the present matter, the United States entity is not a franchise. Counsel clarified that the United States is a corporation that owns and is doing business as a franchise, and stated that the requisite relationship between the U.S. corporation as a subsidiary of the foreign corporation has therefore been satisfied.

In a decision dated June 20, 2003, the director concluded that the petitioner had failed to demonstrate that the United States entity is a subsidiary of the beneficiary's foreign employer. The director, quoting Operating Instruction 214.2(l)(4), which restricts a qualifying relationship to those not based on a contractual, licensing, or franchise agreement, stated that because the petitioner is doing business as a Steak to Go franchise the issue is whether the petitioner has control over the franchise. The director determined that although the petitioner may own the franchise the petitioner does not possess control of the business. The director therefore concluded that the petitioner did not satisfy the regulatory criteria for a qualifying relationship. Accordingly, the director denied the petition.

On appeal, counsel acknowledges the director's claim that a franchise relationship is not typically considered to be qualifying, but explains that "[i]f the US Company was a franchisee of the foreign company, the quoted [operating instruction] would apply." Counsel states that instead the U.S. entity is a corporation that is doing business as a franchise, but is not a franchisee of the foreign entity. Counsel claims that the petitioning organization is a subsidiary of the foreign company because 51% of the petitioner's outstanding stock is owned by the foreign company. Counsel further claims that this satisfies the regulatory requirements of ownership and control of the subsidiary.

On review, the petitioner has failed to demonstrate that the beneficiary's foreign employer and the United States entity possess a qualifying relationship as required in section 101(a)(15)(L) of the Act. The regulations and case law further confirm that the key factors for establishing a qualifying relationship between the U.S. and foreign entities are ownership and control. *Matter of Siemens Medical Systems, Inc.* 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); *see also Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988) (in immigrant visa proceedings). In the context of this visa petition, ownership refers to the direct and indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International, supra* at 595.

For purposes of clarification, the AAO will first address which entities should be considered in determining the existence of a qualifying relationship. Pursuant to the regulation at § 214.2(l)(3)(i), the appropriate organizations to consider when determining a qualifying relationship are "the petitioner and the organization which employed or will employ the alien." As correctly noted by the director, an association between a foreign and U.S. entity based on a franchise agreement is usually insufficient to establish a qualifying relationship. See OI 214.2(l)(4)(iii)(D) (associations between companies based on factors such as ownership of a small amount of stock in another company, or licensing or franchising agreements do not create affiliate relationships between the entities for L purposes); 9 FAM 41.54 N7.1-5. A franchise, like a license, typically requires that the franchising organization comply with the franchisor's restrictions, without actual ownership and control of the franchise organization. *See Matter of Shick*, 13 I&N Dec. 647 (Reg. Comm. 1970) (no qualifying relationship exists where the association between two companies was based on a license and royalty agreement that was subject to termination since the relationship was determined to be "purely contractual"). In the present matter however, counsel correctly notes that the United States entity is a corporation doing business as a franchise, but is not a franchise itself. Accordingly, the fact that the petitioner operates a franchise is irrelevant to whether it possesses a qualifying relationship with the beneficiary's foreign employer.

The record contains several unexplained discrepancies regarding the foreign entity's ownership and control of the United States entity. While both the petitioner and counsel repeatedly claim in documentation submitted with the nonimmigrant petition and on appeal that the foreign entity is the parent company of the United States corporation, the record contains conflicting evidence. Specifically, between two of the petitioner's stock certificates, one identifies the beneficiary as the owner of 501 shares of stock and the second, a cancelled stock certificate, rescinds the beneficiary's interest in the 501 shares of stock. Counsel explains in his June 2003 response to the director's request for evidence that a stock certificate was mistakenly issued to the beneficiary and submits an additional stock certificate identifying the foreign corporation as the holder of 510 shares of stock. However, the petitioner's stock transfer ledger does not demonstrate that the beneficiary's stock was reissued to the beneficiary's foreign employer. The transfer ledger documents the following three "original" issuances of stock: 501 shares to Jan Soysal; 510 shares to Soysaltrans Ltd.; and 490 shares to [redacted]. As each transfer is identified on the ledger as an original, the ledger does not support counsel's claim that the foreign entity received the beneficiary's cancelled shares of stock. Additionally, the Assignment of Subscription and Stock Sale-Purchase Agreement both identify the recipients of the petitioner's stock as [redacted] not the beneficiary's foreign employer.

Moreover, Schedules K-1 associated with the petitioner's 2001 corporate tax return identify JEESS, Inc. as the shareholder of 51% of the petitioning organization, rather than the foreign corporation.[1] In the February 11, 2003 letter submitted with the nonimmigrant petition, the foreign company's general manager stated that JEESS, Inc. purchased 51% of the petitioner's stock in March 2002. None of the documentation related to stock ownership in the petitioning organization, including the Assignment of Subscription, the Stock Sale-Purchase Agreement, the stock certificates, or the stock transfer ledger, identifies JEESS, Inc. as a shareholder of the petitioning corporation. Counsel has failed to explain these relevant discrepancies in the record. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Furthermore, the petitioner claims that the foreign entity owns a 51% interest in the U.S. corporation. The petitioner submitted a copy of a U.S. Income Tax Return for an S Corporation (Form 1120S). To qualify as a subchapter S corporation, a corporation's shareholders must be individuals, estates, certain trusts, or certain tax-exempt organizations, and the corporation may not have any non-resident alien shareholders. *See* Internal Revenue Code, § 1361(b)(1999). A corporation is not eligible to elect S corporation status if a foreign corporation owns it in any part. This conflicting information has not been resolved.

As a result of the unexplained discrepancies, the AAO cannot conclude that a parent-subsidiary relationship exists between the beneficiary's foreign employer and the petitioning organization.

There is also insufficient evidence demonstrating an affiliate relationship between the two organizations. Although the petitioner stated that the beneficiary's foreign employer is owned equally between Jan Soysal and Erol Soysal, there is no documentation in the record, such as stock certificates, the corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder

[1] The general manager of the foreign corporation explained in his February 2003 letter that the foreign entity incorporated JEESS, Inc. on November 30, 2002. The record does not contain any additional information confirming the foreign company's ownership and control of JEESS, Inc.

meetings confirming the claimed ownership interests. Additionally, as a result of the unexplained inconsistencies in the documentation relating to the ownership of the U.S. entity, it cannot be determined that the beneficiary, Jan Soysal, owns and controls 51% of the petitioning organization. Therefore, the AAO cannot determine the existence of an affiliate relationship between the beneficiary's foreign employer and the United States corporation.

Accordingly, the petitioner has not established that a qualifying relationship exists between it and the beneficiary's foreign employer as required by section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). For this reason, the appeal will be dismissed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.